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Herbalife International, Inc.; and Herbalife
9 International of America, Inc.

10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

13
14 JEFF RODGERS; PATRICIA
RODGERS; JENNIFER RIBALTA;
15 IZAAR VALDEZ, individually and
on behalf of all others similarly
16 situated,

17 Plaintiffs,

18 vs.

19 HERBALIFE LTD.; HERBALIFE
INTERNATIONAL, INC.;
20 HERBALIFE INTERNATIONAL OF
AMERICA, INC.,

21 Defendants.
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CASE NO. 2:18-cv-07480-JAK (MRWx)

[Related Case 2:13-cv-02488-BRO-RZ]

**HERBALIFE'S NOTICE OF
MOTION AND MOTION TO
DISMISS**

*[Filed concurrently with Declaration of
Roxane Romans and Request for Judicial
Notice]*

Date: January 28, 2019

Time: 8:30 A.M.

Crtrm.: 10B

Assigned to Hon. John A. Kronstadt

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 28, 2019, at 8:30 A.M., or as soon
3 thereafter as this matter may be heard in the above-entitled court, before the
4 Honorable John A. Kronstadt, United States District Judge for the Central District of
5 California, Western Division, in Courtroom 10B, Defendants Herbalife Ltd.,
6 Herbalife International, Inc., and Herbalife International of America, Inc.
7 (“Herbalife”) will, and hereby do, move pursuant to Fed. R. Civ. P. 12(b)(6) for an
8 order dismissing Plaintiffs Jeff Rodgers, Patricia Rodgers, Jennifer Ribalta, and
9 Izaar Valdez’s Class Action Complaint (the “Complaint”). The motion is based on
10 the following grounds:

- 11 • Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs Jeff Rodgers, Patricia
12 Rodgers, and Izaar Valdez fail to state a claim upon which relief may
13 be granted as to all of their claims because their claims were released in
14 the class action settlement approved in *Bostick, et al. v. Herbalife*
15 *International of America, Inc., et al.*, Case No. 2:13-cv-02488-BRO-RZ
16 (C.D. Cal.).
- 17 • Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), all of the Plaintiffs fail to
18 state a claim upon which relief may be granted with respect to Counts I
19 (conducting the affairs of a civil RICO enterprise) and II (conspiracy to
20 violate civil RICO) because Plaintiffs do not sufficiently allege (a) the
21 existence of a distinct enterprise; (b) a cognizable injury to their
22 business or property; (c) that the alleged misrepresentations that form
23 the basis for their RICO claims amount to more than mere puffery; and
24 (d) the predicate act of wire fraud with the requisite specificity.
25 Plaintiffs also separately fail to allege their claim for RICO conspiracy
26 with specificity.
- 27 • Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), all of the Plaintiffs fail to
28 state a claim upon which relief may be granted with respect to Count III

1 (the Florida Deceptive and Unfair Trade Practices Act, or “FDUTPA”)
2 because (a) the California choice-of-law clause contained in Plaintiffs’
3 distributorship agreements bars Plaintiffs from bringing a claim under
4 FDUTPA; (b) Plaintiffs fail to allege with specificity that Herbalife
5 engaged in deceptive or unfair practices, or that such alleged practices
6 amounted to more than mere puffery; and (c) Plaintiffs fail to allege
7 that Herbalife’s conduct proximately caused them damages recoverable
8 under FDUTPA.

- 9 • Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), all of the Plaintiffs fail to
10 state a claim upon which relief may be granted with respect to
11 Count IV (unjust enrichment) because (a) Plaintiffs do not, as they
12 must, allege the claim under a quasi-contract theory and (b) the claim
13 sounds in fraud and is not alleged with the requisite specificity.
- 14 • Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), Plaintiffs fail to state
15 a claim upon which relief may be granted with respect to Count V
16 (negligent misrepresentation) because Plaintiffs fail to plead with
17 specificity (a) the misrepresentations on which their fraud claim is
18 premised; (b) the defendants responsible for the alleged
19 misrepresentations; and (c) statements that amount to more than mere
20 puffery.

21 The motion is based upon this Notice of Motion, the attached Memorandum
22 of Points and Authorities, the Declaration of Roxane Romans, Herbalife’s Request
23 for Judicial Notice, the pleadings on file, and such other evidence and argument as
24 the Court may receive.

25 Pursuant to Local Rule 7-3, counsel for Herbalife and Plaintiffs met and
26 conferred concerning Herbalife’s anticipated motion to dismiss on September 5,
27 2018, but did not reach a resolution.

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DATED: September 28, 2018

Respectfully submitted,

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Paul S. Chan
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By: /s/ Mark T. Dooks
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Three of the four remaining Plaintiffs in this putative class action assert
4 claims against Herbalife that were fully and finally adjudicated and released in the
5 2015 nationwide class action settlement in *Bostick v. Herbalife* approved by this
6 Court.¹ The *Bostick* Plaintiffs, like the Plaintiffs here, alleged that Herbalife
7 misrepresented the nature of its business opportunity, and that it made these
8 misrepresentations at various events. The *Bostick* settlement provided for
9 \$17.5 million in cash rewards to individuals who were Herbalife distributors at any
10 time from April 1, 2009, to December 2, 2014, in order to compensate them for their
11 alleged failed pursuit of the Herbalife business opportunity.

12 Plaintiffs Patricia Rodgers, Jeff Rodgers, and Izaar Valdez, each of whom
13 was an Herbalife distributor during the *Bostick* class period, are therefore subject to
14 the *Bostick* settlement’s broad release. The *Bostick* release, among other things,
15 precludes *Bostick* settlement class members from bringing claims premised on
16 allegations that Herbalife engaged in “false and/or misleading advertising” or that
17 Herbalife operated a “fraudulent scheme.” The claims these three Plaintiffs now
18 bring fall squarely within the scope of the *Bostick* release and are therefore barred.
19 Notwithstanding Plaintiffs’ transparent attempt to plead around the *Bostick*
20 settlement, this case, like *Bostick*, is fundamentally about alleged misrepresentations
21 Herbalife made to its distributors about the likelihood of success regarding its
22 business opportunity. That is precisely the claim that was settled and released in
23 *Bostick*.

24 _____
25 ¹ Of the eight Plaintiffs who initially brought this putative class action in the
26 Southern District of Florida, four were compelled to arbitrate their claims against
27 Herbalife. D.E. 106. The claims of the remaining four Plaintiffs, Jeff Rodgers,
28 Patricia Rodgers, Jennifer Ribalta, and Izaar Valdez, against Herbalife were
transferred to this Court pursuant to the California forum selection clauses found in
their distributorship agreements with Herbalife. *Id.*

1 Separate and apart from the *Bostick* release, all four of the remaining
2 Plaintiffs, including Jennifer Ribalta, also separately fail to allege facts sufficient to
3 sustain each of their claims. First, Plaintiffs cannot allege the most basic elements
4 of a RICO claim. The Complaint does not, and cannot, allege the existence of a
5 distinct enterprise, as opposed to the ordinary business affairs of Herbalife and its
6 distributor network. Nor do Plaintiffs allege a cognizable injury to their business or
7 property under RICO, but instead seek losses stemming from a failed business
8 opportunity, an expectancy interest that is not recoverable under RICO.

9 Moreover, Plaintiffs' allegations of wire fraud fail to meet Rule 9(b)'s
10 heightened pleading standard. Plaintiffs merely cite puffery found in social media
11 posts, fliers, and pep talks given at in-person presentations, without specifying
12 which particular Herbalife entity, if any, made these statements. Plaintiffs do not
13 even attempt to allege which of these alleged statements form the basis for their wire
14 fraud claim, but instead expect Herbalife and the Court to sift through these alleged
15 statements, including hundreds of pages of exhibits (mostly consisting of photos and
16 generic fliers), and connect the dots themselves. Neither the length of the
17 Complaint nor its broad class allegations are a substitute for specificity as to the
18 named Plaintiffs.

19 Plaintiffs' Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")
20 claim is barred by the valid California choice-of-law provision found in Plaintiffs'
21 distributorship agreements with Herbalife, which plainly covers the parties' dispute
22 here. Plaintiffs also impermissibly seek consequential damages under their
23 FDUTPA claim, *i.e.*, what they expected to earn in pursuing the Herbalife business
24 opportunity. Finally, Plaintiffs' FDUTPA claim and its remaining common law
25 claims for unjust enrichment and negligent misrepresentation, each of which is
26 grounded in fraud, are not pled with the requisite specificity under Rule 9(b).

27 **II. PROCEDURAL BACKGROUND**

28 This putative class action was originally filed in the Southern District of

1 Florida on September 18, 2017, by eight current and former Herbalife distributors
2 against Herbalife and 44 of Herbalife’s highest-ranking individual distributors (the
3 “Individual Defendants”). D.E. 1. at ¶ 4. On December 14, 2017, Herbalife and the
4 Individual Defendants jointly moved to compel the arbitration of all eight Plaintiffs’
5 claims, and in the alternative, transfer their claims to this Court. D.E. 62, 63. On
6 August 23, 2018, Judge Cooke granted the motions in part, compelling four of the
7 Plaintiffs’ claims against Herbalife to arbitration and transferring the remaining four
8 Plaintiffs’ claims to this Court. D.E. 106. Judge Cooke denied the motions as to the
9 Individual Defendants, ordering the severance of the case and that all eight
10 Plaintiffs’ claims against the Individual Defendants remain open in the Southern
11 District of Florida. *Id.* Judge Cooke denied Herbalife’s pending Motion to Dismiss
12 as moot. *Id.*

13 On September 20, 2018, the Individual Defendants noticed their appeal of
14 Judge Cooke’s ruling. On September 24, 2018, Judge Cooke stayed Plaintiffs’
15 action against the Individual Defendants pending the appeal. The four Plaintiffs
16 who were compelled to arbitrate their claims against Herbalife have yet to make
17 a demand for arbitration.

18 **III. RELEVANT FACTUAL BACKGROUND**

19 **A. Plaintiffs’ Allegations**

20 Each of the Plaintiffs is either an Herbalife distributor or the spouse of a
21 distributor. D.E. 1 (Complaint) at ¶¶ 26, 149, 151, 164, 179, 182, 193; Declaration
22 of Roxane Romans (“Romans Decl.”), Exhs. A-C. Plaintiffs contend that they
23 attended numerous Herbalife sponsored events, at which misrepresentations were
24 made regarding the viability of the Herbalife business opportunity. Complaint at
25 ¶¶ 3, 26, 147. Plaintiffs allege primarily that they were pitched a “guaranteed
26 pathway to attaining life changing financial success,” and were encouraged to
27 “attend every event” in order to achieve such success. *Id.* at ¶¶ 2, 9. Plaintiffs
28 allege that they have been attending such events since as early as 2008. *Id.* at

1 ¶¶ 149, 183. Plaintiffs appear to seek as damages not only the cost of attending
2 events, but also money spent in pursuing what they deem to be a “fraudulent and
3 illusory” business opportunity. *Id.* at ¶¶ 163, 173, 181, 190. Based on these
4 allegations, Plaintiffs bring claims under the federal RICO statute and FDUTPA,
5 along with common law claims for unjust enrichment and negligent
6 misrepresentation.

7 **B. All Four Plaintiffs Entered into Distributorship Agreements with**
8 **Herbalife Containing California Choice-of-Law Clauses.**

9 Plaintiffs each entered into distributorship agreements with Herbalife in order
10 to pursue the Herbalife business opportunity. Romans Decl., Exhs. A-C. Each of
11 those agreements contains a California choice-of-law clause, which provides that
12 “[t]his Agreement, and any dispute arising from the relationship between the parties
13 to this Agreement, shall be governed by the domestic law of the State of California
14 without the application of conflict of law principles.” *Id.*, Exhs. A and B at ¶ 11,
15 Exh. C at ¶ 17.²

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22 ² The Court may consider the distributorship agreements entered into between the
23 Plaintiffs and Herbalife, because the agreements are “integral” to their claims and
24 their authenticity is undisputed. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.
25 1998), *superseded by statute on other grounds* (“Where [a document attached to
26 a motion to dismiss] is integral to the plaintiff’s claims and its authenticity is not
27 disputed, the plaintiff obviously is on notice of the contents of the document and the
28 need for a chance to refute evidence is greatly diminished.”). Notably, these
agreements are already in the record, and Plaintiffs have never disputed their
authenticity. *See* D.E. 63-2. Judge Cooke relied on these agreements in ordering
the transfer of Plaintiffs’ claims to this Court. D.E. 106.

1 **C. Plaintiffs Patricia Rodgers, Jeff Rodgers, and Izaar Valdez**
2 **Released Their Claims in the Class Action Settlement in *Bostick v.***
3 ***Herbalife.***

4 **1. The Plaintiffs in *Bostick* Alleged the Same**
5 **Misrepresentations That Form the Basis for Plaintiffs’**
6 **Claims Here.**

7 In 2015, Herbalife settled *Bostick v. Herbalife Int’l of America, Inc., et al.*,
8 Case No. 2:13-cv-02488-BRO-RZ (C.D. Cal.), a nationwide class action brought by
9 Herbalife distributors. Like the Plaintiffs here, the *Bostick* Plaintiffs alleged
10 primarily that Herbalife had misrepresented to them that if they “put in the time,
11 effort, and commitment,” they could successfully pursue the Herbalife business
12 opportunity. Request for Judicial Notice (“RJN”), Exh. 2 (*Bostick* Amended
13 Complaint) at ¶ 1. Additionally, the *Bostick* complaint, like the Complaint here,
14 alleged that such misrepresentations were made at Herbalife-sponsored events. *See,*
15 *e.g., id.* at ¶ 32, ¶ 146, ¶ 166 (“You only have to put in the hard work along with the
16 dedication, patience and discipline, attributes you can learn at the events”), ¶¶ 174
17 177 (describing alleged misrepresentations made at Herbalife “Extravaganza”
18 events), ¶ 214 (alleging Herbalife encouraged distributors to put money towards
19 attending “Training events/seminars”), ¶ 302(f) (alleging that at “[t]raining and
20 events, such as the Extravaganza, . . . Herbalife distributors made material false
21 representations regarding the ‘business opportunity’ and the success that
22 a distributor could get through Herbalife by purchasing products and recruiting
23 others to do the same.”).

24 **2. Patricia Rodgers, Jeff Rodgers, and Izaar Valdez Were**
25 ***Bostick* Settlement Class Members.**

26 The *Bostick* class action settlement that this Court approved defines the
27 “Settlement Class” as “all persons who are or were Herbalife members or
28 distributors in the United States at any time from April 1, 2009 to December 2,

1 2014.” RJN, Exh. 5 (*Bostick* Amended Final Judgment) at ¶ 3.³ Plaintiffs Patricia
2 Rodgers and Izaar Valdez were *Bostick* class members, because each of them is
3 alleged to have been, and in fact was, an Herbalife distributor during the *Bostick*
4 class period.⁴ Complaint at ¶¶ 149-156, 161, 183, 189-90; Romans Decl., Exhs. A,
5 C. Neither of them opted out. RJN, Exh. 5 at Attachment A. Plaintiff Jeff Rodgers,
6 who is alleged to have pursued the Herbalife business opportunity under his wife’s
7 distributorship, is bound by the release contained in the *Bostick* judgment, as it
8 extends to any agents or representatives of the Settlement Class members.
9 Complaint at ¶¶ 155-163; RJN, Exh. 5 at ¶ 12.

10 **3. The *Bostick* Settlement Release Broadly Covers Claims**
11 **Arising from Misrepresentations Made by Herbalife**
12 **Concerning its Business Opportunity.**

13 The release contained in the *Bostick* judgment broadly provides that Herbalife
14 is released from “all claims . . . known or unknown” as of September 18, 2015,⁵

15 _____
16 ³ The *Bostick* settlement excludes those Herbalife distributors who signed an
17 arbitration agreement with Herbalife during or after September 2013 (when
18 Herbalife began incorporating arbitration clauses directly into its distributorship
19 agreements). RJN, Exh. 5 at ¶ 3. None of the Plaintiffs whose claims were
20 transferred to this Court signed such an agreement.

21 ⁴ Although Plaintiff Jennifer Ribalta also was a distributor during this time period,
22 she was excluded from the *Bostick* settlement because she was a Global Expansion
23 Team or “GET” member, one of Herbalife’s higher levels of distributors. RJN, Exh.
24 5 at ¶ 3.

25 ⁵ While the Final Judgment in *Bostick* was issued on June 17, 2015, the “Effective
26 Date” of the *Bostick* settlement, as defined in the Stipulation of Settlement, occurred
27 when the Final Judgment became “final,” specifically when the “time for the filing
28 or noticing of any appeal from the Court’s Final Judgment” expired. RJN, Exh. 3 at
¶ 1.7.3. The *Bostick* judgment became final when the time for the objectors to the
appeal the denial of their motion for reconsideration of this Court’s order granting
final approval expired. This Court denied objectors’ motion for reconsideration on
August 18, 2015. RJN, Exh. 6 at 1. The objectors’ deadline to appeal the order
denying their motion was 30 days later, on September 17, 2015. *See* Fed. R. App. P.

1 that:

- 2 • Were or could have been asserted in *Bostick*; and
- 3 • “[A]re based upon, arise out of, or reasonably relate to,” among other
4 things: (1) “any actual, potential or attempted recruitment of any
5 Herbalife member during the Class Period;” (2) “*any allegation that,*
6 during the Class Period, Herbalife engaged in any acts of unfair
7 competition; *false and/or misleading advertising*; or operated any type
8 of illegal, pyramid, endless chain, or *fraudulent scheme*;” and (3) “any
9 of the facts, schemes, transactions, *events*, matters, occurrences, acts,
10 disclosures, statements, *misrepresentations, omissions*, or failures to
11 act *that have been or could have been alleged or asserted in the*
12 *Action.*”

13 RJN, Exh. 5 at ¶ 12 (emphasis added).

14 The *Bostick* release further provides that all claims “*known or unknown*, as
15 of the Effective Date” are released “whether or not such Settlement Class Member
16 executes and delivers a Claim Form.” *Id.* at ¶ 15 (emphasis added). The release
17 also provides that all Settlement Class Members shall “conclusively be deemed to
18 have waived the rights afforded by California Civil Code Section 1542, and any
19 similar statute or law, or principle of common law, of California or any other
20 jurisdiction.” *Id.*

21 The *Bostick* release expressly excludes from its scope claims arising out of
22 the purchase of Herbalife stock, bonuses for the sale of certain products owed by
23 Herbalife to its distributors, or any allegation that an Herbalife product was
24 defective. *Id.*, Exh. 5 at ¶ 12.

25
26
27
28 4(a)(1)(A). Thus, the Final Judgment became “final” on September 18, 2015. RJN,
Exh. 6 at 1.

1 **IV. ARGUMENT**

2 **A. Patricia Rodgers, Jeff Rodgers, and Izaar Valdez’s Claims Are**
3 **Barred by the *Bostick* Class Action Settlement Release.**

4 **1. The *Bostick* Settlement Agreement Is Governed by California**
5 **Law, Which Broadly Construes Settlement Releases.**

6 The Stipulation of Settlement in *Bostick* provides that “[t]he rights and
7 obligations of the parties to the Settlement Agreement shall be construed and
8 enforced in accordance with, and governed by, the laws of the State of California.”
9 *Id.*, Exh. 3 at ¶ 12.10. Under California law, the release in the *Bostick* settlement
10 deserves the broadest possible treatment. First, because the *Bostick* settlement
11 releases “all claims . . . known or unknown, as of the Effective Date,” it constitutes
12 a “standard general release” and “includes claims that are not expressly enumerated
13 in the release.” *Id.*, Exh. 5 at ¶ 12; *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th
14 562, 587 (2010).⁶ Moreover, where, as here, “a settlement’s text demonstrates
15 a clear intent to release unknown claims, such a release is valid.” *Basco v. Toyota*
16 *Motor Corp.*, No. CV 09-6307-GHK (RZX), 2011 WL 13127142, at *8 (C.D. Cal.
17 Nov. 30, 2011); RJN, Exh. 3 at ¶ 8.2, Exh. 5 at ¶ 15 (expressly waiving the
18 protections afforded by Cal. Civ. Code § 1542).⁷

19 In addition, releases such as the one approved in *Bostick* “are not to be shorn
20 of their efficiency by any narrow, technical, and close construction If parties
21 intend to leave some things open and unsettled, their intent so to do should be made
22 manifest.” *Villacres*, 189 Cal. App. 4th at 589 (quoting *United States v. Wm. Cramp*
23

24 _____
25 ⁶ Unless otherwise noted, internal citations and quotation marks have been
omitted.

26 ⁷ That section of the California Civil Code provides that “[a] general release does
27 not extend to claims which the creditor does not know or suspect to exist in his or
28 her favor at the time of executing the release, which if known by him or her must
have materially affected his or her settlement with the debtor.”

1 & Sons Co., 206 U.S. 118, 128 (1907)); RJN, Exh. 5 at ¶ 12 (excluding from the
2 scope of the *Bostick* release claims not at issue here).

3 **2. The *Bostick* Settlement Release Subsumes the Claims**
4 **Brought by Patricia Rodgers, Jeff Rodgers, and Izaar**
5 **Valdez.**

6 The Ninth Circuit has held that “a federal court may release not only those
7 claims alleged in the complaint, but also a claim based on the identical factual
8 predicate as that underlying the claims in the settled class action even though the
9 claim was not presented *and might not have been presentable in the class action.*”
10 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (emphasis in
11 original). The *Bostick* release therefore bars the claims brought by Plaintiffs Patricia
12 Rodgers, Jeff Rodgers, and Izaar Valdez, each of whom is a *Bostick* settlement class
13 member, because (1) the misrepresentations alleged in *Bostick* also form the basis
14 for Plaintiffs’ Complaint; (2) the original *Bostick* complaint alleged RICO claims
15 identical to the ones Plaintiffs bring here; and (3) the *Bostick* settlement
16 compensated class members for the same losses Plaintiffs seek to recover here.

17 **a. The Misrepresentations Alleged in *Bostick* Form the**
18 **Basis for Plaintiffs’ Complaint.**

19 The misrepresentations Plaintiffs allege were made at certain events are
20 identical to those the *Bostick* plaintiffs alleged occurred at these very same events.
21 *Compare* Complaint at ¶ 3 (encouraging distributors to “‘attend every event’ if they
22 want to be successful”), ¶ 6 (“If you go to all of the events, you qualify for
23 everything – you will get rich”), ¶¶ 84-89 (describing the “Extravaganza” events,
24 alleging that “attendance is pushed aggressively”) *with* RJN, Exh. 2 at ¶¶ 32, 146,
25 166 (“You only have to put in the hard work along with the dedication, patience and
26 discipline, attributes you can learn at the events”), ¶¶ 174-77 (describing alleged
27 misrepresentations made at Herbalife “Extravaganza” events), ¶ 214 (alleging
28 Herbalife encouraged distributors to put money towards attending “Training

1 events/seminars”), ¶ 302(f) (alleging that at “[t]raining and events, such as the
2 Extravaganza, . . . Herbalife distributors made material false representations
3 regarding the ‘business opportunity’ and the success that a distributor could get
4 through Herbalife by purchasing products and recruiting others to do the same.”).

5 Therefore, not only “could” Plaintiffs’ allegations “have been asserted” in
6 *Bostick*—their allegations *were asserted* in *Bostick* and later released in the *Bostick*
7 judgment. RJN, Exh. 5 at ¶ 12. That Plaintiffs here choose to focus their
8 allegations on their attendance at certain Herbalife events does not save their claims
9 from the *Bostick* release. Plaintiffs fundamentally allege the “promotion of an
10 inherently fraudulent business opportunity, in which the Herbalife Defendants know
11 participants have no reasonable chance of success.” Complaint at ¶ 372. *This same*
12 *allegation* formed the basis for the *Bostick* complaint, thereby barring Plaintiffs’
13 claims here. RJN, Exh. 2 at ¶ 269 (alleging as fraudulent “the touted, yet non-
14 existent, Herbalife ‘business opportunity’ for everyone, including but not limited to
15 Herbalife’s massive advertising campaign.”), ¶ 271 (“Herbalife has made numerous
16 misleading representations about the business opportunity of Herbalife and the
17 income that a recruit or a distributor can realize by becoming a distributor and
18 participating in the scheme.”); see *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442
19 F.3d 741, 749 (9th Cir. 2006) (“While Plaintiffs seek to hold Defendants liable by
20 positing a different theory of anti-competitive conduct, the price-fixing predicate . . .
21 and the underlying injury are identical. Therefore, Plaintiffs’ claims were
22 extinguished by the [prior class action] settlement.”).

23 **b. The Original *Bostick* Complaint Alleged RICO Claims**
24 **Identical to the RICO Claims Plaintiffs Assert Here.**

25 The original *Bostick* complaint asserted several claims under RICO, including
26 alleged violations of sections 1962(c) and (d), which subsume the RICO claims
27 brought by Plaintiffs here. The *Bostick* complaint alleged, as Plaintiffs do here, an
28 enterprise consisting of Herbalife and its “beneficiaries” and “promoters,” including

1 some of the same individuals named in the Complaint.⁸ RJN, Exh. 1 at ¶¶ 11, 236.
2 The *Bostick* complaint also alleged, as Plaintiffs do here, that the purpose of the
3 enterprise was to:

4 (1) earn money through fraudulent means, (2) entice
5 individuals to become Herbalife distributors, (3) entice
6 individuals to purchase products from Herbalife, (4) entice
7 individuals to recruit others to become Herbalife
8 distributors and profit off those recruits' purchases of
9 Herbalife products, and (5) reap large profits for
10 themselves based on false representations.

11 *Id.* at ¶ 239; *compare* Complaint at ¶ 347 (alleging the same).

12 The *Bostick* complaint also asserted wire fraud as a predicate act for its RICO
13 claims, alleging that misrepresentations regarding the Herbalife business
14 opportunity and the “wealth that a recruit or Herbalife distributor could achieve”
15 were transmitted through e-mail, videos, and websites. RJN, Exh. 1 at ¶¶ 253, 254,
16 257; *compare*, e.g., Complaint at ¶¶ 68, 93, 96, 124, 155 (alleging the same).

17 That the RICO claims brought in *Bostick* were voluntarily dismissed after
18 Herbalife brought its initial motion to dismiss is of no moment because the *Bostick*
19 release covers all claims that “were or could have been asserted in the *complaints*
20 filed in” *Bostick*. RJN, Exh. 5 at ¶ 12; *see also Howard v. Am. Online Inc.*, 208 F.3d
21 741, 748 (9th Cir. 2000) (“A judicially approved settlement agreement is considered
22 a final judgment on the merits.”).

23 **c. The *Bostick* Settlement Compensated Class Members**
24 **for the Same Losses Plaintiffs Claim Here.**

25 As in *Bostick*, Plaintiffs here allege that Herbalife’s business opportunity is
26 not “viable,” and they seek damages for money they lost pursuing this allegedly
27 “fraudulent and illusory” opportunity, including alleged losses stemming from the
28 purchase of Herbalife products. *See, e.g.*, Complaint at ¶ 3 (“Herbalife business

⁸ Plaintiffs’ claims against the Individual Defendants remain in the Southern District of Florida.

1 opportunity participants are told that they must ‘attend every event’ if they want to
2 be successful; and that they must ‘qualify’ for special treatment at these events by
3 making large monthly purchases of Herbalife’s products.”), ¶ 26 (“[T]here is no
4 viable retailing opportunity.”), ¶ 163 (seeking losses of at least \$80,000 from
5 “pursuing Herbalife’s fraudulent and illusory business opportunity,” outside of the
6 \$20,000 the Rodgers Plaintiffs allegedly spent by participating at events), ¶¶ 179,
7 181, 190; *compare* RJN, Exh. 2 at ¶ 3 (alleging the *Bostick* plaintiffs “did not make
8 money as promised” and “failed [at the Herbalife business opportunity] because
9 they were doomed from the start”).

10 The *Bostick* settlement compensated class members for the same losses
11 Plaintiffs seek to recover here, allocating \$17,500,000 in cash awards to class
12 members who allegedly lost money pursuing the Herbalife business opportunity.
13 RJN, Exh. 3 at ¶ 4.1. Importantly, regardless of whether or not Plaintiffs Patricia
14 Rodgers, Jeff Rodgers, and Izaar Valdez filed claims and received settlement
15 payments in *Bostick*, they are still bound by its release. *Id.*, Exh. 5 at ¶ 15, Exh. 4 at
16 47 (in its order approving the *Bostick* settlement, this Court held that “the notice
17 procedures approved here comport with due process and Rule 23.”).

18 **B. Plaintiffs’ RICO Claims (Counts I and II) Fail.**

19 In order to state a section 1962(c) violation of civil RICO, a plaintiff must
20 allege “(1) conduct (2) of an enterprise (3) through a pattern of (4) racketeering
21 activity.” *Williams v. Countrywide Fin. Corp.*, No. 216CV04166CASAGR, 2017
22 WL 986517, at *9 (C.D. Cal. Mar. 13, 2017). Moreover, a civil RICO plaintiff must
23 allege injury to his “business or property” and that such injury was “‘by reason of’
24 the RICO violation.” *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th
25 Cir. 2008) (quoting 18 U.S.C. § 1964(c)).

26 All of the Plaintiffs’ RICO claims under section 1962(c) (conducting the
27 affairs of an enterprise) should be dismissed because Plaintiffs do not sufficiently
28 allege: (1) the existence of a distinct enterprise; (2) a cognizable injury to their

1 business or property; (3) that the alleged misrepresentations amount to more than
2 mere puffery; and (4) the predicate act of wire fraud with particularity. For the same
3 reasons, Plaintiffs’ RICO conspiracy claim under section 1962(d) fails. The
4 conspiracy claim also fails because Plaintiffs do not plead the existence of
5 a conspiracy with particularity.

6 **1. Plaintiffs Allegations’ Fail to Establish the Most Basic**
7 **Elements of a Section 1962(c) Claim Under RICO.**

8 **a. Plaintiffs Fail to Allege the Existence of a Distinct**
9 **RICO Enterprise.**

10 Under RICO, “an ‘enterprise’ is a being different from, not the same as or
11 part of, the person whose behavior the act was designed to prohibit.” *Sever v.*
12 *Alaska Pulp Corp.*, 978 F.2d 1529, 1533 (9th Cir. 1992). Plaintiffs run afoul of this
13 rule because they plead an association-in-fact enterprise consisting entirely of
14 Herbalife and some of its own distributors. Complaint at ¶¶ 4, 138, 206-325
15 (alleging that Herbalife “and its highest ranking members . . . jointly produce and
16 sell these events in close association,” and that these members are Herbalife’s “top
17 distributors,” two of whom, John Tartol and Leslie Stanford, allegedly served on
18 Herbalife’s Board of Directors).

19 Plaintiffs’ allegations amount to nothing more than a claim that Herbalife’s
20 business model is fraudulent. *See id.* at ¶¶ 7, 26, 29, 34 (contending that Herbalife’s
21 business model precludes success on the part of Plaintiffs, and that there “is no
22 viable retailing opportunity”). Plaintiffs therefore fail to allege an enterprise that is
23 distinct from Herbalife’s business and the ordinary channels through which it sells
24 its products and recruits distributors. *See In re Toyota Motor Corp. Unintended*
25 *Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, 826 F. Supp. 2d 1180,
26 1202–03 (C.D. Cal. 2011) (dismissing RICO claim because “Plaintiffs merely allege
27 that the Defendants are associated in a manner directly related to their own primary
28 business activities Indeed, the [Complaint] alleges no more than that

1 Defendants’ primary business activity—the design, manufacture, and sale or lease of
2 Toyota vehicles—was conducted fraudulently.”); *Chi Pham v. Capital Holdings,*
3 *Inc.*, No. 10CV0971-LAB AJB, 2011 WL 3490297, at *5 (S.D. Cal. Aug. 9, 2011)
4 (dismissing RICO claim because “Plaintiffs have alleged only an enterprise that is
5 the defendants by a different name. Neither the alleged RICO enterprise nor the
6 defendants has a purpose distinct from the goals and objectives of the other.”);
7 *United Food & Commercial Workers Unions & Employers Midwest Health Benefits*
8 *Fund v. Walgreen Co.*, 719 F.3d 849, 854 (7th Cir. 2013) (affirming dismissal of
9 RICO claim for failure to plead distinct enterprise, holding that the complaint “does
10 not adequately allege that [Defendants] were conducting the affairs of [an
11 enterprise], as opposed to their own affairs.”).

12 **b. Plaintiffs Improperly Seek Recovery for an Expectancy**
13 **Interest Under RICO.**

14 In order to have standing to sue under RICO, a plaintiff must allege a
15 “concrete financial loss.” *Hill v. Opus Corp.*, 841 F. Supp. 2d 1070, 1090 (C.D.
16 Cal. 2011). Therefore, “[i]njury to mere expectancy interests or to an intangible
17 property interest is not sufficient to confer RICO standing.” *Chaset v. Fleer/Skybox*
18 *Int’l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002). Plaintiffs lack standing under RICO
19 because they allege they “received no benefit” from attending events, and seek as
20 losses money they hoped to earn in pursuing “Herbalife’s fraudulent and illusory
21 business opportunity.” Complaint at ¶¶ 7, 163. Plaintiffs therefore seek an
22 expectancy interest that is not cognizable under RICO. *See also Amarelis v. Notter*
23 *Sch. of Culinary Arts, LLC*, No. 6:13-CV-54-ORL-31KRS, 2014 WL 5454387, at
24 *2, 6 (M.D. Fla. Oct. 27, 2014) (dismissing RICO claim brought by graduates of
25 culinary institute against their former school, because the allegation that the school
26 misrepresented the amount of money students could earn after graduation
27 constituted an “expectancy interest[.]” that does not “give rise to [an] actionable
28 RICO injury.”).

1 **c. The Misrepresentations Alleged in the Complaint**
2 **Amount to Non-Actionable Puffery, Not Fraud.**

3 Puffery cannot form the basis for a wire fraud claim. *See Cty. of Marin v.*
4 *Deloitte Consulting LLP*, 836 F. Supp. 2d 1030, 1039 (N.D. Cal. 2011). Puffery is
5 characterized by “vague, exaggerated, generalized or highly subjective statements
6 regarding a product or business which do not make specific claim.” *Id.* Moreover,
7 “assertions that a particular product is *the ‘best’* or speculative statements about
8 *possible profits* are non-actionable opinions (‘puffing’) and a party is not entitled to
9 **rely** upon them.” *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086,
10 1093 (C.D. Cal. 1999) (emphasis added).

11 The misrepresentations alleged in the Complaint are classic puffery, and fall
12 outside the ambit of the RICO statute. *See, e.g.*, Complaint at ¶ 66 (“[W]ith the
13 right training, anything is possible . . .”), ¶ 68 (“I can do this!”), ¶ 84 (referencing
14 “the BIGGEST and MOST IMPORTANT event to attend”), ¶ 86 (“[W]e were all
15 extremely moved by the enthusiasm and excitement in the business.”), ¶ 127
16 (referencing a sign at an event that notes: “CHANGING PEOPLE’S LIVES”), ¶ 165
17 (referencing a social media post that said: “NEVER GIVE UP”). These alleged
18 statements amount to “slogans” that are not “capable of being classified as true or
19 false,” but to the extent these statements do convey affirmative representations, “the
20 representations are mere sales puffing that is not actionable RICO mail or wire
21 fraud.” *In re All Terrain Vehicle Litig.*, No. CV-89-3334-RSWL, 1990 WL 138229,
22 at *2 (C.D. Cal. July 19, 1990).

23 **d. Plaintiffs Fail to Plead the Predicate Act of Wire Fraud**
24 **with Particularity.**

25 The elements of wire fraud are: “(1) a scheme to defraud; (2) use of the wires
26 in furtherance of the scheme; and (3) a specific intent to deceive or defraud.”
27 *United States v. Shipsey*, 363 F.3d 962, 971 (9th Cir. 2004). The predicate act of
28 wire fraud is subject to Federal Rule of Civil Procedure 9(b)’s heightened pleading

1 standard, which “requires that a plaintiff allege the time, place, and manner of each
2 predicate act, the nature of the scheme involved, and the role of each defendant in
3 the scheme.” *Toyota Motor Corp.*, 826 F. Supp. 2d at 1201; *Hill*, 841 F. Supp. 2d at
4 1088. Therefore, “[a] plaintiff may not simply lump together multiple defendants
5 without specifying the role of each defendant in the fraud.” *Toyota Motor Corp.*,
6 826 F. Supp. 2d at 1201. The Complaint fails to plead wire fraud with the requisite
7 specificity.

8 First, Plaintiffs fail to allege any misrepresentations with particularity.
9 Plaintiffs purport to identify a laundry list of alleged statements made at events, but
10 do not identify which of these statements form the basis for their wire fraud claim
11 (indeed, many of these alleged statements were apparently made orally at live
12 events, not over the wires). *See, e.g.*, Complaint at ¶¶ 61-62, 64, 66, 68, 77, 84, 90,
13 92. Defendants and the Court cannot be forced to sift through the exhibits attached
14 to the Complaint, which compile various fliers, social media postings, and photos,
15 and speculate as to which statements amongst these various exhibits constitute the
16 alleged misrepresentations on which Plaintiffs’ RICO claims are premised.
17 Plaintiffs conclude by alleging that “[e]ach month Defendants distribute, or cause to
18 be distributed, hundreds of thousands of fraudulent messages about Circle of
19 Success events across the wires,” a hopelessly vague allegation that plainly fails to
20 meet the high pleading bar set by Rule 9(b). *Id.* at ¶ 96.

21 Second, the Complaint fails to specify which defendants, if any, made the
22 alleged misrepresentations, instead impermissibly lumping together three Herbalife
23 entities and a slew of Individual Defendants, who are not a part of the action that
24 was transferred to this Court. *See* Complaint at ¶¶ 4, 54 (contending that all
25 Defendants “jointly produce and sell” the events at issue and collectively
26 “encouraged Plaintiffs and Class Members to attend a Circle of Success event every
27 month.”), ¶ 61 (“*Individual Defendants* constantly reiterate . . .”), ¶ 68 (“Long
28 scripted days of income claims accompanied by loud music, shouting, clapping,

1 hugging, and crying) (emphasis added), ¶ 71 (“Herbalife’s STS system is
2 owned and controlled by a web of *Defendant connected entities*”) (emphasis
3 added), ¶ 84 (“Extravaganza is billed as ‘the BIGGEST and MOST IMPORTANT
4 event to attend’ on the Circle of Success calendar.”), ¶ 90 (“*Speakers* tell the
5 audience that they can achieve the same level of success themselves simply by
6 continuing to attend events.”) (emphasis added), ¶ 97 (“*Defendants* expect and
7 encourage their Circle of Success promotional messages to be remixed and echoed
8 across the wires.”) (emphasis added), ¶ 136 (referencing “more than 4,000”
9 Instagram posts).

10 Because it is impossible to glean from these allegations who allegedly made
11 the cited statements, Plaintiffs fail sufficiently to allege a claim for wire fraud. *See*
12 *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007) (Rule 9(b) require[s]
13 plaintiffs to differentiate their allegations when suing more than one defendant . . .
14 and inform each defendant separately of the allegations surrounding his alleged
15 participation in the fraud.”).

16 **2. Plaintiffs Also Fail Adequately to State a Claim for RICO**
17 **Conspiracy Under Section 1962(d).**

18 Plaintiffs’ claim for RICO conspiracy under § 1962(d) fails because, as
19 explained above, they have not sufficiently alleged a substantive violation of RICO.
20 *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (“Plaintiffs cannot
21 claim that a conspiracy to violate RICO existed if they do not adequately plead a
22 substantive violation of RICO.”)

23 Plaintiffs’ RICO conspiracy claim also fails independently because the
24 Complaint does not plead the alleged conspiracy with particularity under Rule 9(b).
25 *See Chung Y. Goh, et al. v. Prima Fin. Grp. Inc. et al.*, No. CV 17-03630-SVW-
26 PJW, 2017 WL 7887860, at *3 (C.D. Cal. July 26, 2017) (“[T]o state a claim for
27 RICO conspiracy where the predicate acts sound in fraud, the plaintiff must plead
28 the conspiracy with the particularity required by Rule 9(b).”). Plaintiffs do not

1 allege with specificity either “an agreement that is a substantive violation of RICO
2 or that [Herbalife] agreed to commit, or participated in, a violation of two predicate
3 offenses.” *Howard*, 208 F. 3d at 751. Nor do Plaintiffs plead with specificity that
4 Herbalife was “aware of the essential nature and scope of the enterprise and
5 intended to participate in it.” *Id.*

6 Plaintiffs merely contend that:

7 Defendants have agreed and conspired to violate 18 U.S.C.
8 § 1962(c) as set forth above in violation of 18 U.S.C.
9 § 1962(d). Defendants have intentionally conspired and
10 agreed to directly, and indirectly, conduct and participate
11 in the conduct of the affairs of the Circle of Success
12 enterprise through a pattern of racketeering activity.

13 Complaint at ¶ 363. This conclusory allegation is plainly insufficient to establish
14 the existence of an agreement to violate RICO under Rule 9(b)’s heightened
15 pleading standard. *See Prima Fin. Grp.*, 2017 WL at *3 (“Conclusory allegations
16 that RICO defendants entered into an agreement are insufficient.”).

17 **C. Plaintiffs’ Claim Under the Florida Deceptive and Unfair Trade**
18 **Practices Act (Count III) Fails.**

19 **1. The Choice-of-Law Clause Found in Plaintiffs’**
20 **Distributorship Agreements Bars the Claim.**

21 The valid California choice-of-law clauses found in each of the Plaintiffs’
22 distributorship agreements requires the dismissal of Plaintiffs’ FDUTPA claim. *See*
23 *Romans Decl.*, Exhs. A and B at ¶ 11, Exh. C at ¶ 17. Plaintiffs’ claims plainly
24 “arise[] from the relationship” between them and Herbalife, as Plaintiffs claims are
25 based on their alleged failed pursuit of the Herbalife business opportunity and the
26 misrepresentations Herbalife allegedly made to them as distributors. *Id.*; *see*
27 *Complaint* at ¶ 163 (alleging that the Rodgers Plaintiffs “lost more than \$100,000
28 pursuing Herbalife’s fraudulent and illusory business opportunity.”), ¶ 190 (alleging
that Izaar Valdez “spent more than \$10,000 purchasing Herbalife products in order
to ‘qualify for events’ and move up in the Herbalife marketing plan.”).

1 Indeed, the only reason Plaintiffs attended the events alleged in the Complaint
2 was to pursue the Herbalife business opportunity. *Id.* at ¶ 3 (“Herbalife business
3 opportunity participants are told that they must ‘attend every event’ if they want to
4 be successful”); see *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 470
5 (1992) (“[A] valid choice-of-law clause, which provides that a specified body of law
6 ‘governs’ the ‘agreement’ between the parties, encompasses all causes of action
7 arising from or related to that agreement, regardless of how they are characterized,
8 including tortious breaches of duties emanating from the agreement or the legal
9 relationships it creates.”).⁹

10 The choice-of-law clause is enforceable because California “has as a
11 substantial relationship to the parties or their transaction,” as Herbalife is
12 headquartered in Los Angeles, California. Complaint at ¶¶ 203-205; *Palomino v.*
13 *Facebook, Inc.*, No. 16-CV-04230-HSG, 2017 WL 76901, at *3 (N.D. Cal. Jan. 9,
14 2017) (also noting that “California has a strong policy favoring enforcement of
15 choice-of-law provisions.”). Plaintiffs’ claims are therefore barred under the
16 California choice-of-law clause found in their distributorship agreements.

17 **2. Plaintiffs in Any Event Fail to Plead a Claim Under**
18 **FDUTPA.**

19 In order to state a claim under FDUTPA, a plaintiff must plead:
20 “(1) a deceptive act or unfair practice in the course of trade or commerce;
21 (2) causation; and (3) actual damages.” *BPI Sports, LLC v. Labdoor, Inc.*, No. 15-
22 _____

23 ⁹ Notably, Judge Cooke in the Southern District of Florida found the forum
24 selection clause contained in Plaintiffs’ distributorship agreements to be valid and to
25 encompass their claims. D.E. 106. Plaintiff Jeff Rodgers, although not a signatory
26 to his wife’s distributorship agreement, is nevertheless bound by its choice-of-law
27 clause because his claims are “closely related to the contractual relationship”
28 between Patricia Rodgers and Herbalife. See *J. Greenburg, D.D.S., Inc. v. White
Rock Capital Sols., LLC*, No. CV 11-9498 PA (JEMX), 2012 WL 13012673, at *4
(C.D. Cal. Feb. 22, 2012) (enforcing forum selection clause against non-signatory
on this ground).

1 62212-CIV-BLOOM, 2016 WL 739652, at *4 (S.D. Fla. Feb. 25, 2016). Rule
2 9(b)'s heightened pleading standard applies to FDUTPA claims "based on deception
3 or fraud." *Ellis v. Warner*, No. 15-10134-CIV, 2017 WL 634287, at *23 (S.D. Fla.
4 Feb. 16, 2017). Plaintiffs fail to allege that Herbalife engaged in deceptive or unfair
5 practices, or that Herbalife proximately caused damages cognizable under
6 FDUTPA.

7 **a. Plaintiffs' FDUTPA Claim Fails Because It Is Based on**
8 **Alleged Puffery and Is Not Pled with the Requisite**
9 **Specificity.**

10 Plaintiffs' allegations do not establish that Defendants violated FDUTPA. As
11 discussed above in Section II(B)(1), the misrepresentations alleged in the Complaint
12 amount to mere puffery and are not pled with the specificity required by Rule 9(b).
13 *See Perret v. Wyndham Vacation Resorts, Inc.*, 889 F. Supp. 2d 1333, 1342 (S.D.
14 Fla. 2012) (dismissing FDUTPA claim because "most of the alleged
15 misrepresentations Plaintiffs rely upon are nothing more than opinion or puffery.").

16 **b. Plaintiffs Fail to Allege That Herbalife's Conduct**
17 **Proximately Caused Damages Recoverable Under**
18 **FDUTPA.**

19 FDUTPA permits recovery for "actual damages," as opposed to consequential
20 or special damages. *BPI Sports*, 2016 WL at *6. Actual damages under FDUTPA
21 are defined as "the difference in the market value of the product or service in the
22 condition in which it was delivered and its market value in the condition in which it
23 should have been delivered according to the contract of the parties." *Rodriguez v.*
24 *Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. Dist. Ct. App.
25 2010). Here, it appears that Plaintiffs seek as damages both the cost of attending
26 Herbalife events and their purported losses in pursuing the Herbalife business
27 opportunity. Complaint at ¶¶ 163, 173, 179, 181, 184. Neither alleged injury is
28 sufficient to support a claim under FDUTPA.

1 First, Plaintiffs fail adequately to plead damages stemming from the
2 attendance at events because they do not allege that there was any difference
3 between the content presented at such events and the content they reasonably
4 expected to be presented at such events. *See Rodriguez*, 38 So. 3d at 180. Nor can
5 Plaintiffs make such a claim since Plaintiffs, having regularly attended such events,
6 admit they well knew what to expect at each event they attended. *See Complaint* at
7 ¶¶ 55, 56, 76, 84, 90, 147.

8 Second, to the extent Plaintiffs seek as losses their “large monthly purchases
9 of Herbalife product,” they fail to allege the “difference in the market value”
10 between the products they purchased and the products they expected to receive. *See*
11 *id.* at ¶¶ 3, 163, 179, 181; *Rodriguez*, 38 So. 3d at 180. Plaintiffs do not allege that
12 the products they purchased were not delivered in adequate condition, nor do they
13 allege that they were unable to sell, consume, or return such products. And, to the
14 extent Plaintiffs instead seek the profits they expected to earn through the pursuit of
15 the Herbalife business opportunity, *i.e.*, the sale of Herbalife product, such damages
16 plainly are not recoverable under FDUTPA. *See Diversified Mgmt. Sols., Inc. v.*
17 *Control Sys. Research, Inc.*, No. 15-81062-CIV, 2016 WL 4256916, at *6 (S.D. Fla.
18 May 16, 2016) (“[C]onsequential damages, including lost profits, cannot be
19 recovered under FDUTPA.”).¹⁰

20 **D. Plaintiffs Fail to Plead Sufficient Facts Supporting a Claim for**
21 **Unjust Enrichment (Count IV).**

22 Although there is no standalone cause of action for unjust enrichment in
23 California, the Ninth Circuit allows for such a claim if it is stylized as one based in
24 quasi-contract. *See Goldman v. Bayer AG*, No. 17-CV-0647-PJH, 2017 WL
25 3168525, at *8 (N.D. Cal. July 26, 2017). Such a claim, however, must be pled
26

27 _____
28 ¹⁰ To the extent Plaintiffs seek to recover treble damages under their FDUTPA
claim, there is no statutory basis for such a request.

1 under the theory that the defendant “has been unjustly conferred a benefit ‘through
2 mistake, fraud, coercion, or request.’” *Id.* (quoting *Astiana v. Hain Celestial Grp.,*
3 *Inc.*, 783 F.3d 753, 762 (9th Cir. 2015)). Additionally, a claim for unjust
4 enrichment that sounds in fraud must be pled with specificity under Rule 9(b). *See*
5 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003) (“In some
6 cases, the plaintiff may allege a unified course of fraudulent conduct and rely
7 entirely on that course of conduct as the basis of a claim. In that event, the claim is
8 said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading of that claim
9 as a whole must satisfy the particularity requirement of Rule 9(b).”).

10 Here, Plaintiffs altogether fail to plead their unjust enrichment claim under a
11 quasi-contract theory of recovery. Ultimately, their claim for unjust enrichment is
12 based on the same allegations as their other claims, namely that Herbalife
13 misrepresented the nature of its business opportunity and Plaintiffs’ likelihood of
14 succeeding at that opportunity should they attend certain events. *See* Complaint at
15 ¶ 382 (“[T]he Herbalife Defendants conned Plaintiffs into benefitting the
16 Defendants by using the same or materially similar representations and methods,
17 and by exploiting the same informational advantage, giving Plaintiffs the false
18 expectation that Plaintiffs would benefit from their participation in the Circle of
19 Success events.”). As discussed above in Section II(B)(1), these allegations are not
20 pled with the requisite specificity and therefore also fail to support a claim for unjust
21 enrichment. *See Bayer*, 2017 WL at *9 (dismissing unjust enrichment claim where
22 it was “premised on the same allegations as the UCL, CLRA, and (possibly) breach
23 of warranty claim” and plaintiff had failed sufficiently to allege that the labeling on
24 defendant’s product was deceptive).

25 Even if the Court were to construe Plaintiffs’ claim as one grounded in quasi-
26 contract, Plaintiffs’ claim still fails because “[a] claim for unjust enrichment,
27 restitution and/or quasi-contract cannot lie where the plaintiff has received the
28 benefit of the alleged bargain.” *Jonathan Chuang v. Dr. Pepper Snapple Grp., Inc.*,

1 No. CV1701875MWFMRWX, 2017 WL 4286577, at *8 (C.D. Cal. Sept. 20, 2017);
2 *see also Comet Theatre Enterprises, Inc. v. Cartwright*, 195 F.2d 80, 83 (9th Cir.
3 1952) (“There is no equitable reason for invoking restitution when the plaintiff gets
4 the exchange which he expected.”). Here, Plaintiffs fail to plead with specificity
5 what benefits they unjustly conferred on Herbalife, or how they were deprived of the
6 benefit of the alleged bargain.

7 First, Plaintiffs only vaguely allege that they conferred on Herbalife the
8 benefit of “hundreds of hours in unpaid labor.” Complaint at ¶ 380. Plaintiffs,
9 however, fail to allege with any specificity what this “labor” entailed or how this
10 labor benefited Herbalife. Second, Plaintiffs do not allege how Herbalife unjustly
11 retained the proceeds from event ticket sales, nor can they, as they were not denied
12 attendance at such events or otherwise deprived of hearing the content they expected
13 to hear at such events. *Id.* at ¶¶ 55, 56, 76, 84, 90 (alleging that each event “delivers
14 substantially similar content . . . in a substantially similar format” and that these
15 events occur at regular intervals with set pricing). Third, Plaintiffs fail to
16 specifically plead that they themselves recruited people to become Herbalife
17 distributors. *Id.* ¶ 380. Ultimately, the utter lack of plausible allegations supporting
18 Plaintiffs’ unjust enrichment claim demonstrates that it falls well short of meeting an
19 ordinary pleading standard, let alone Rule 9(b)’s heightened pleading bar.

20 **E. Plaintiffs’ Claim for Negligent Misrepresentation (Count V) Fails**
21 **for the Same Reasons That Its Claim for Wire Fraud Fails.**

22 Rule 9(b)’s heightened pleading standard also applies to claims for negligent
23 misrepresentation. *See Prime Healthcare Servs., Inc. v. Humana Ins. Co.*, 230 F.
24 Supp. 3d 1194, 1208 (C.D. Cal. 2017).¹¹ As discussed above in Section II(B)(1), the
25

26 _____
27 ¹¹ Although California courts are split on this issue, because Plaintiffs contend that
28 Herbalife “actively made false statements,” Plaintiffs’ negligent misrepresentation
claim is really one for fraudulent misrepresentation, and is therefore unquestionably

1 Complaint’s allegations of fraud fail to meet Rule 9(b)’s pleading requirements,
2 because Plaintiffs do not plead with specificity (1) the misrepresentations on which
3 their fraud claim is premised; (2) the defendants responsible for making the alleged
4 misrepresentations; and (3) statements that amount to more than mere puffery. *See*
5 *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *12
6 (N.D. Cal. June 5, 2009) (“[S]tatements amounting to mere puffery are not
7 actionable” under a claim for negligent misrepresentation.); *Hutson v. Am. Home*
8 *Mortg. Servicing, Inc.*, No. C 09-1951 PJH, 2009 WL 3353312, at *14 (N.D. Cal.
9 Oct. 16, 2009) (dismissing claim for negligent misrepresentation, because “[m]ere
10 labels and conclusions that lump all defendants together are insufficient to withstand
11 Rule 9(b)’s standard.”).

12 **V. CONCLUSION**

13 Based on the foregoing, Herbalife respectfully urges the Court to grant its
14 Motion and dismiss the Complaint with prejudice.

15
16 DATED: September 28, 2018

Respectfully submitted,

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26 Herbalife International, Inc.; and Herbalife
27 International of America, Inc.

28 _____
subject to Rule 9(b). *Haddock v. Countrywide Bank, NA*, No. CV
146452PSGFFMX, 2015 WL 9257316, at *22 (C.D. Cal. Oct. 27, 2015).